IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 9607 of 2000
with
SPECIAL CIVIL APPLICATION No 9618 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

1 to 5 No

STATE OF GUJARAT

Versus

BHATHIBHAI MAGANBHAI

Appearance:

MR RV DESAI ASSTT GOVERNMENT PLEADER for Petitioner

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 22/09/2000

C.A.V. JUDGEMENT

1. In both these petitions, the officers of the Forest Department through the State of Gujarat have challenged the awards of the Labour Court whereby the workmen concerned are ordered to be reinstated with a

part of the backwages. The grounds of challenge being the same, both the petitions are heard together and disposed by this common judgment.

2. The relevant facts in Special Civil Application No.9607 of 2000 are that the respondent, a daily-rated employee, had worked for more than 240 days in each year of his alleged 14 years of service except in the year 1988 at the end of which he was discharged from service in violation of Section 25-F of the Industrial Disputes Act, 1947. Upon the failure of the petitioner to substantiate or prove any of the pleas taken in his written statement, the Labour Court awarded reinstatement with 35% backwages and costs. In Special Civil Application No.9618 of 2000, the respondent had served as a watchman for about one-and-half years. He was discharged from service on 4.4.1991 and upon his raising an industrial dispute, he was re-employed from 16.8.1991. However, he was again discharged on 14.12.1992 and another watchman was employed in his place. A plea of abandonment of service by the respondent was taken before the Labour Court but the petitioner failed to prove the same. In such circumstances, the Labour Court found the termination of service to be in violation of the provisions of the I.D. Act and awarded reinstatement with 25% backwages for a specific period.

3. Challenging the awards as above, the learned Assistant Government Pleader submitted that the Range Forest Officer and subordinate staff of the Forest Department are carrying out the functions of public welfare and the same is a sovereign function of the State. The work under the petitioners is of seasonal nature and the workmen, such as the respondents, were employed as casual rozamdars employed for a particular season or project. The officers for the time being in charge were empowered to engage such labourers on casual and daily-wage basis from amongst the labourers available at that time. The work performed by the Department is based on the guidelines and grants of the Government and the financial aid from the World Bank. It is submitted that the Labour Court has, without appreciating these facts and the nature of employment and status of the employer, made the two awards without proper application of mind. It is further submitted that the petitioners are not covered within the meaning and definition of "industry" under the I.D.Act and even otherwise, the provisions of Section 25-F of the Act do not apply in the facts of the case in view of the nature and conditions of employment of the respondents.

4. In support of his submissions, the learned Assistant Government Pleader has relied upon the judgment of the Apex Court in EXECUTIVE ENGINEER (STATE OF KARNATAKA) v. K. SOMASETTY [(1997) 2 LLJ 94] and submitted that the State is not an "industry" under the I.D.Act as the function of public welfare of the State is a sovereign function. In this context, the full bench judgment of the Hon'ble Supreme Court in CHIEF CONSERVATOR OF FORESTS v. JAGANNATH MARUTI KONDHARE [(1996) 2 SCC 293] directly deals with the case of employment under the Forest Department and it is held that the scheme in question in that case could not be regarded as a part of inalienable or inescapable function of the State for the reason that the scheme was intended even to fulfil the recreational and educational aspirations of the people. There could be no doubt that such a work could as well be undertaken by an agency which is not required to be even an instrumentality of the State. Therefore, such schemes were not regarded as a part of the sovereign function of the State and there was no threshold bar in knocking the door of the Industrial Courts. The relevant observations made by their lordships of the Supreme Court may be quoted as under:

" We may not go by the labels. Let us reach the hub. And the same is that the dichotomy of sovereign and non-sovereign functions does not really exist - it would all depend on the nature of the power and manner of its exercise, as observed in para 23 of Nagendra Rao case [(1994) 6 SCC 205]. As per the decision in this case, one of the tests to determine whether the executive function is sovereign in nature is to find out whether the State is answerable for such action in courts of law. It was stated by Sahai, J. that acts like defence of the country, raising armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. They are, therefore, not amenable to the jurisdiction of ordinary civil court inasmuch as the State is immune from being sued in such matters. But then, according to this decision the immunity ends there. It was then observed that in a welfare State, functions of the State are not only the defence of the country or administration of justice or maintaining law and order but extends to regulating and controlling the

activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. Because of this the demarcating line between sovereign and non-sovereign powers has largely disappeared.

The aforesaid show that if we were to extend the concept of sovereign function to include all welfare activities as contended on behalf of the appellants, the ratio in Bangalore Water Supply case would get eroded, and substantially. We would demur to do so on the face of what was stated in the aforesaid case according to which except the strictly understood sovereign function, welfare activities of the State would come within the purview of the definition of industry; and, not only this, even within the wider circle of sovereign function, there may be an inner circle encompassing some units which could be considered as industry if substantially severable."

5. In another case in GENERAL MANAGER, TELECOM v. S.SRINIVASA RAO [AIR 1998 SC 656], the observations concluded as under are relevant:

"A two-Judge Bench of this Court in Theyyam Joseph's case (1996) 8 SCC 489: (1996 AIR SCW 1365) held that the functions of the Postal Department are part of the sovereign functions of the State and it is, therefore, not an 'industry' within the definition of Section 2 (j) of the Industrial Disputes Act, 1947. Incidently, this decision was rendered without any reference to the seven-Judge Bench decision in Bangalore Water Supply (AIR 1978 SC 548). In a later two-Judge Bench decision in Bombay Telephone Canteen Employees' Association case, AIR 1997 SC 2817, this decision was followed for taking the view that the Telephone Nigam is not an 'industry'. Reliance was placed in Theyyam Joseph's case (1996) 8 SCC 489: (1996 AIR SCW 1365) (supra) for that view. However, in Bombay Telephone Canteen Employees' Association case (i.e. the latter decision), we find a reference to the Bangalore Water Supply case. After referring to the decision in Bangalore Water Supply, it was observed that if the doctrine enunciated in Bangalore Water Supply is strictly applied, the consequences is 'catastrophic'. With respect, we are unable to subscribe to this view for the

> obvious reason that it is in direct conflict with the seven-Judge Bench decision in Bangalore Water Supply case (supra) by which we are bound. It is needless to add that it is not permissible for us, or for that matter any Bench of lesser strength, to take a view contrary to that in Bangalore Water Supply (supra) or to by-pass that decision so long as it holds the field. Moreover, that decision was rendered long back nearly two decades earlier and we find no reason to think otherwise. Judicial discipline requires us to follow the decision in Bangalore Water Supply case (1978) 2 SCC 213: (AIR 1878 SC 548). We must, therefore, add that the decision in Theyyam Joseph (1996) 8 SCC 489: (1996 AIR SCW 1365) and Bombay Telephone Canteen Employees' Association, AIR 1997 SC 2817, cannot be treated as laying down the correct law. This being the only point for decision in this appeal, it must fail."

5.1 The ratio of the full bench decision of the Hon'ble Supreme Court as quoted above concludes the issue as far as the question of the petitioners being an "industry" is concerned. The division bench of this Court (Coram: D.M.Dharmadhikari, CJI and J.M.Panchal, J.) has also taken the view while deciding Letters Patent Appeal No.304 of 2000 that the contention that Forest Department is not covered within the meaning of "industry" cannot be accepted and that the provisions of the I.D.Act would prevail over the Government Resolutions or executive instructions.

6. The second issue with regard to the application of Section 25-F of the I.D.Act, in view of the peculiar nature of employment and appointment of the respondents, is sought to be argued without having proper foundation of facts. It is nowhere in evidence in either proceedings that the respondent workmen were employed on a specific project for a limited period. The case is sought to be built upon the slender plea of the respondents having been daily rated casual employees. The learned counsel for the petitioners has relied upon the judgment of this Court in EXECUTIVE ENGINEER ROADS AND BUILDING DEPARTMENT v. RAMESHKUMAR K. BHATT [2000 (1) GLR 866] to submit that there was no justification for the Labour Court to apply Section 25-F of the I.D.Act which was hardly applicable to an employee who was appointed for a fixed time. In the facts of that case, the appointment was purely on ad-hoc basis and after expiry of the time his services could be terminated at

any time without being given any reasons or notice. The view of the Labour Court that the workman was not appointed for a fixed time was found to be contrary to the evidence on record. On a further finding that the power of discharge was not exercised in a mala fide manner or under colourable exercise of power and since the grants were stopped and few divisions had to be closed, it was held that the impugned order of discharge could not be quashed by the Labour Court and there was no justification to apply Section 25-F of the I.D.Act. In the other judgment relied upon on behalf of the petitioner in the case of DISTRICT PANCHAYAT, JAMNAGAR DANUBHA K. GOHIL [2000 (1) GLH 238], this Court has taken the view, relying upon the judgment of the Apex Court in HIMANSHU KUMAR VIDYARTHI v. STATE OF BIHAR [JT 1997 (4) SC 560] that a daily wager had no right to posts and he cannot claim reinstatement on post which was purely temporary and in the nature of a daily wager. In the facts of that case, the order of reinstatement was held to be invalid also on the ground that the Labour Court had not given a clear finding that there still existed the post on which the workman could be reinstated. On the same analogy, it is contended that a direction of reinstatement in the facts of this case also would create problems in getting the award implemented and executed and it would be improper to compel the petitioner to reinstate a daily wager whose service could be dispensed with at any time without any notice. The learned counsel has further relied upon the judgment of the Supreme Court in STATE OF HIMACHAL PRADESH v. SURESH KUMAR VERMA [AIR 1996 SC 1565] to submit that since the project in which the respondents were engaged had come to an end, the Court cannot give any direction to re-engage them in any other work or appoint them against existing vacancies as, otherwise, the judicial process would become other mode of recruitment de horse the rules. It has to be noted that, in the facts of this case, before the Hon'ble Supreme Court the issue of observation or violation of Section 25-F had not arisen at all. However, in RATTAN SINGH v. UNION OF INDIA [(1997) 11 SCC 396], the Hon'ble Supreme Court has categorically held that where a workman had continuously worked for more than 240 days in a year, he was entitled to protection of Section 25-F of the Act and that protection could not be denied to him on the ground that he was a daily rated worker. However, in view of the fact that 20 years had elapsed, their lordships were pleased to direct payment of a consolidated amount in lieu of backwages as well as reinstatement. Referring to the said judgment, this Court (Coram H.K.Rathod, J.) has, in Special Civil Application No.1752 of 1999, observed as under:

" The apex court has also considered the very same question in the case of RATTAN SINGH v. UNION OF INDIA, (1997) 11 SCC 396 and it has been held that the provisions of Section 25-F of the I.D.Act are applicable to daily rated employees also. There is one decision of the Madhya Pradesh High Court in case of M.P.Textile Corporation v. Krishnakant Pancholi and others reported in 1998 (80) GLR 84 delivered by Hon'ble Mr.Justice D.M.Dharmadhikari (as His Lordship then were) wherein it has been held that the provisions of Section 25-F of the I.D.Act are applicable to all categories of employees including those employed on daily rated basis or for seasonal work of intermittent nature. All categories of employees putting in more than one year's service are entitled to the payment of retrenchment compensation as a condition precedent for their retrenchment under Sec.25-F of the I.D.Act. In view of the principles laid down in the aforesaid decisions, the contention of Ms. Mandavia cannot be accepted and considering the definition of the term 'workman' under Sec. 2 (s) of the Act also, whether he is daily rated or casual or part time, is covered in such definition of the workman and therefore, the contention cannot be accepted. The provisions of Sec.25-F are applicable to such employees."

7. The provisions of Section 25-F of the I.D.Act prescribes conditions precedent to retrenchment of a workman. Therefore, upon finding of its non-fulfilment, the order of reinstatement has to follow because the termination of service in violation of Section 25-F is void ab initio. The consequential order of reinstatement is, in effect, not an order to re-employ but to declare that the termination had never taken place in the eye of law. In that view of the matter, the complications or difficulties in reinstating the workman will become irrelevant and the right of the employer to terminate the services of the workman in accordance with law would remain unaffected.

8. Accordingly, both the contentions raised by the petitioners fail and no other reason or ground having been canvassed to interfere with the impugned awards, both the petitions are dismissed.

Sd/-
(KMG Thilake)

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